NO. 93-124

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

PETER MICK AND DONALD BECK PETITIONER

VERSUS

RESOLUTION TRUST CORPORATION RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PETER R. MICK
PRO SE
4 STONEY BROOK TRAIL
KINNELON,NJ 07405
201-838-1725

DONALD C. BECK
PRO SE
18 WOOD GLEN WAY
PARSIPPANY,NJ 07005
201-334-7524

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this courts decision in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (Supp. IV 1992) bar petitioners' claims that **[if the RTC does not abide by the agreements in the mortgage obligation as required by the D'Oenche, Duhme doctrine, 12 U.S.C. 1823(e), the Constitution and the Fifth Amendment then]** the petitioners are not liable on the mortgage obligation held by the Resolution Trust Corporation for a failed financial institution.

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Planned Real Estate Development Full Disclosure Act. N.J.S.A. 45:22A-37(a)

Any developer disposing of real property subject to this act, who shall violate section 6 hereof, or who in disposing of such property makes an untrue statement of material fact or omits a material fact from any application for registration, or amendment thereto, or from any public offering statement, or who makes a misleading statement with regard to such disposition, shall be liable to the purchaser for double damages suffered, and court costs expended, including reasonable attorneys fees, ...

INTERESTED PARTIES:

Patrick L. Tomin

Richard W. Payton

William W. Hrisko

Perskie & Nehmad

SUMMARY

The respondent has asked the wrong question and therefore draws the wrong conclusion. The respondent's question (Res. I) bears no relationship to the question the petitioners have placed before the court. The question presented on page (i) of this brief has boldly printed in brackets what has to be added to the respondent's question for it to apply to this case.

The respondent agrees that the loan documents guarantee the petitioner the right to assert any defenses against successors and assigns of the lender that he could assert against the lender. He also agrees that the requirements of D'Oenche, Duhme and 12 U.S.C. 1823(e) are met. In spite of this, respondent claims that the agreement is invisible to the RTC, not enforceable as the law demands.

The respondent also agrees that the

mortgage incorporates the master deed, which provides for the property to be usable as a hotel, but even though the entire deed is properly recorded he claims that the portions of the master deed detrimental to the RTC are not really incorporated into the mortgage and are therefore secret agreements.

By wrongly assuming that the agreements are secret and invisible the respondent claims to prevail.

The respondent continues to come to highly prejudiced conclusions and erroneously decides that D'Oenche, Duhme and 12 U.S.C. 1823(e) **do not pertain to agreements** but only to defenses, and that agreements are not defenses.

Respondent has not addressed the fact that **the relevant law deals with the enforceability of agreements and since the agreements on which the petitioners are relying are not invisible or secret, the petitioners must prevail.**

ARGUMENT

THE RESPONDENTS QUESTION (see Res. I) FOCUSES ON THE FRAUD CASE (WHICH IS NOT ON TRIAL) NEGLECTING THE QUESTION PRESENTED BY THE PETITIONERS.

The phrasing of the respondent's question is the reason the petitioners' question is before the court of last resort. They are combining two independent issues to replace the single issue petitioners have placed before this court.

1st issue Are three covenants in a set of Fannie Mae mortgage documents that meet all of the requirements of 12 U.S.C. 1823(e), D'Oenche, Duhme and its derivative progeny valid against the RTC? This is the petitioners' Question.

2nd issue Will the petitioners' other defenses to the fraud allow them to avoid liability on the mortgage documents in a

fair trial? If this court permits their use the petitioners' claims will consist of far more than the three robust claims in the mortgage documents themselves.

The wording of the respondent's question misleads the court into focusing on the second issue, thus avoiding the consequences of the first issue which is his liability.

The purpose of the Summary Judgement in the court below was to decide the first issue. The RTC steered the court into focusing on the second issue. As a result, the court's ruling, (i.e., that the defenses of the second issue were not admissible) never even dealt with the first issue, a legal question pertaining to the enforceability of agreements in loan documents. This same tactic is being used before this court.

The petitioners feel strongly that this is a shabby tactic for the Justice

Department to use against its own citizens. A clear example of this tactic of drawing in questions relating to the facts of the fraud is the footnote (see Res. 5) where they attempt to suggest that the strong reference in the mortgage to the master deed, which is the only document that describes the structure and its allowed use, is not strong enough to make the master deed completely part of the bank's records even though it was entered into the bank's records as part of the mortgage contemporaneously with the other loan documents. The part of the master deed (the entire document is in the bank's records) that the respondent states may not be in the bank's records refers to unrestricted rentals (see Pet. 13.). The strength of this clause in the deed is such that the respondent would rather deal with it by saying it is not in the bank's records

(making it a secret agreement) when it is in the bank's records. They find this easier than confronting the agreement itself.

The content of this footnote is filled with errors of fact:

1) The word lease should be mortgage.

2) The word lessor should be mortgagee.

3) The mortgage was not issued to a third party. It was issued to the builder (mortgagee).

4) The builder (mortgagee) was required by law N.J.S.A. 45:22A-37(a) to assure that all statements in the master deed were true. Therefore, it was his duty to assure that governmental authorities did not interfere with the use of the premises as defined by the master deed.

5) It was expected that payments to a third party successor or assign of the mortgagee would be conditioned by the agreement of the mortgagee giving the

petitioners the right to unrestricted rentals. Paragraph 11 of the mortgage (see Pet. 12.) binds the RTC to the agreements of the lender contained in the mortgage.

In the case before the court the documents and their conditioning covenants are clear, and in the bank's records, the law is clear in its letter and intent, and the RTC's liability is clear and unquestionable.

THE RESPONDENT'S PRESENTATION OF THE QUESTION PRESENTED SHOWS A LACK OF UNDERSTANDING OF THE ISSUE OR IT IS AN ATTEMPT TO MISLEAD THE COURT

The question the petitioners have placed before the court is whether Article 1, Section 10-1 of the Constitution, the Fifth Amendment, 12 U.S.C. 1823 (e) and common law doctrine bar <u>respondent</u> from claiming that he is

not obligated to honor the agreements of the mortgage obligation.

In their misleading presentation of the same question, the respondent insinuates that it is the petitioners who deny being obligated to honor the agreements in the mortgage obligation.

It has always been made clear by the petitioners that the petitioners are seeking to have the mortgage obligation honored by both parties. The petitioners are liable on the mortgage documents per all of its terms. It is the respondent who is seeking to avoid his obligation by voiding the terms favoring the petitioners.

For the Justice Department to completely evade the question presented and to not address why they will not honor their agreements when the Constitution, the Fifth Amendment, 12 U.S.C. 1823(e) and common law doctrine

demand that they do so is disturbing to the petitioners. Every were you look in the pertaining law and doctrine it states that the RTC will honor properly recorded agreements and it seems that the petitioners should be answered as to why the agreements that protect them, although properly recorded, are subject to some unknown law and therefore not enforceable.

ERRORS OF FACT IN THE RESPONDENTS PRESENTATION OF THE QUESTION

The question as presented by the respondent is highly misleading and erroneous.

1) The defendants did not sign promissory notes, they signed a mortgage obligation (i.e. security instruments, mortgage notes, and all other evidence of title.)

2) The defendants are not claiming

that they are not liable on the mortgage obligation.

3) The defendants are only claiming that they have the right to have the covenants of their contract enforced per the Constitution, the Fifth Amendment, 12 U.S.C. 1823(e) and common law doctrine.

THE RESPONDENT'S ARGUMENT DOES NOT ADDRESS THE QUESTION THE PETITIONERS HAVE PLACED BEFORE THE COURT

The respondent renews the same tactic as employed by the RTC in the courts below. His response is replete with references to what he believes are the petitioner's defenses to the fraud. Not only is his perception of these defenses wrong, were it correct, references to the defenses would only tend to cloud the issues and mislead the court.

It was the RTC that requested a Summary Judgement because it was their

belief that the covenants of the contract where not enforceable against them, but instead they argued the petitioners' fraud case. They did this and they continue to do so in this court without a proper trial where all of the facts can be presented. The fraud was not at issue in the Summary Judgement and it is not at issue in this court. The question at issue that has never been answered and is still being asked, is:

Are the agreements in the mortgage calling for the petitioners to have the right to assert defenses against the RTC and the right to use the property as a hotel, both which condition the obligation and meet all Section 1823(e) requirements, valid and legally binding against the RTC?, and if not, why not?

COMMENT ON THE VALIDITY OF THE OPENING SENTENCE OF RESPONDENTS ARGUMENT

The respondent should be admonished for the gross errors of omission in the first sentence of his argument (see Res. 3.), where he attempts to lead the court into believing that the representations are not in the records of the failed institution.

The entire thrust of the petitioners' argument is that three independent representations exist in the loan documents in the records of the failed institution that meet all of the requirements of 12 U.S.C. 1823(e).

1) THE REPRESENTATION of the petitioners' right to assert any defenses.

2) THE REPRESENTATION that successors and assigns are bound to the lenders agreements.

3) THE REPRESENTATION as to property

usage (warranted fact) in the mortgage referenced master deed.

The first missing representation the respondent himself refers to sixteen (16) lines above the beginning of his argument (see Res. 3.), where he paraphrases the Honorable Judge Politan stating " the court acknowledged that the clause on which the petitioners relied satisfied the requirements of D'Oenche, Duhme and Section 1823(e).....". Since it meets Section 1823(e) it must be in the records of the failed institution.

The second representation is discussed on the following page (see Res. 4.) bottom half, indicating that not only is it in the loan documents but it allows for the enforcement of the first representation against (successors) assignees of the original lender.

The third representation, is discussed in a footnote (see Res. 5.), where it is

indicated that incorporation of the deed by reference falls far short of incorporation by reference of the deed. Whatever that means, he is acknowledging its existence in the documentation.

RESPONDENTS QUOTATION FROM LANGLEY v. FDIC, 484 U.S. 86 (1987) (see Res. 4.) CLEARLY AND CONCLUSIVELY MAKES PETITIONERS CASE PRIMA FACIE.

The quote is stated with comments below.

Quote "an individual who signs a facially unqualified note"

Comment The loan documents are facially qualified per paragraph 11 and 19 of the mortgage (see Pet. 12, 13.) and by paragraph 13 of the master deed (see Pet. 13.) which is incorporated into the mortgage.

Quote "subject to an unwritten and unrecorded condition upon its repayment

has lent himself to a scheme or arrangement that is likely to mislead banking authorities,"

Comment The paragraphs in the mortgage and master deed cited above are written and recorded and are properly in the bank's records and therefore the banking authorities could not have been misled. The rights of the petitioners, provided by the loan documents, have always been known.

Quote "whether the condition consists of performance of a counterpromise (as in D'Oenche, Duhme) or the truthfulness of a warranted fact."

Comment Paragraph 19 of the mortgage (see Pet. 12, 13.) is a counterpromise but differing from D'Oenche, Duhme in that it is on the face of the loan documents. Paragraph 13 of the master deed which is incorporated into the

mortgage is a warranted fact the truthfulness of which the petitioners relied on.

The above demonstrates that it is not the petitioners doing the misleading. It is the bank examiners who are misleading consumers by allowing the banks to purchase loans on the secondary market when they know the terms of such loans will not be honored by the RTC if the bank fails.

RESPONDENT STATES THAT TERMS OF THE LOAN DOCUMENTS ALLOW PETITIONERS TO ASSERT AGAINST (SUCCESSORS) ASSIGNEES OF THE LOAN DOCUMENTS ANY DEFENSES THEY HAD AGAINST THE ORIGINAL LENDER. (see Res. 4.)

Respondent suggests that he does not have to abide by this because the words "successors and assigns" in paragraph 11 (see Pet. 12.) of the mortgage which

normally are defined as any subsequent holder are to be redefined to mean any subsequent holder EXCEPT THE RTC.

If this is the case, it is unfortunate that Fannie Mae, a government chartered organization founded to benefit consumers, did not add this to their documents. By such an omission, the petitioners are now victims of this oversight as well as the fraud.

RESPONDENTS ARE RELUCTANT TO RECOGNIZE THE FACT THAT D'OENCHE, DUHME and 12 U.S.C. 1823(e) ADDRESS THE ENFORCEABILITY OF AGREEMENTS

The respondent seems to feel that D'Oenche Duhme and 12 U.S.C. 1823(e) relate to the RTC's immunity to defenses where in actuality this law deals with agreements and it was the Langley decision that placed warranted facts alongside counterpromises as agreements

and if properly recorded they would be valid and legally binding against the RTC.

An example of this confusion can be seen in the following quote from the respondent's brief.

"D'Oenche, Duhme and Section 1823(e) rest on a contrary premise, that federal regulatory authorities are in fact not subject to defenses that could be asserted against the failed institution, unless those defenses are, among other things, set forth in documents in the files of the failed institution." (Res. 4.)"

If the word defenses is replaced with the word agreements the above quotation comes much closer to encompassing the intent of the Congressionally ratified 12 U.S.C. 1823(e) and the actual D'Oenche,

Duhme doctrine which speak only to the enforceability of agreements. These agreements include counterpromises and warranted facts. This being the case the respondent now is akin to a normal assignee when the agreements are properly in the bank's records unless he has some unwritten power as he suggests and therefore is immune to all damaging agreements.

RELIANCE ON HOWELL v. CONTINENTAL CREDIT CORP., 655 F.2d 743 (7th Cir. 1981) IS NOT MISPLACED

Petitioners are not obligated to pay the loan because of the failure of the lender to assure that the property had no restrictions on rental as provided for in the master deed part of the mortgage, and the failure of the RTC to abide by the terms in the mortgage stating they must face the petitioners' defenses.

The Howell court concluded that when the defense "arises directly and explicitly from the provisions of the leases which were in the bank's files" it is acceptable.

Similarly, the petitioners' three provisions are contained in the loan documents and therefore their defenses are acceptable.

CONCLUSION

It is clear that **a federal law cannot make unenforceable that which this same law**, along with the controlling laws, Article 1, Section 10-1 of the Constitution and the Fifth Amendment, **makes enforceable**. Therefore a writ of certiorari should be granted.

Respectfully submitted.

Peter R. Mick Donald C. Beck (PRO SE)